IN THE COURT OF APPEALS OF IOWA

No. 1-341 / 11-0411
Filed May 25, 2011

IN THE INTEREST OF L.J.,
Minor Child,

M.J.B. and C.M.,
Appellants.

Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, Associate Juvenile Judge.

A father appeals the termination of his parental rights. **AFFIRMED.**

Stephen W. Scott, Dubuque, for appellants.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Ralph Potter, County Attorney, and Jean A. Becker, Assistant County Attorney, for appellee.

Steven Drahozal, Dubuque, for mother.

Mary Beth Fleming, Dubuque, attorney and guardian ad litem for minor child.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

A twenty-one-year old father with learning disabilities appeals from the juvenile court's order terminating his parental rights to his daughter, L.J. The child's paternal grandmother, who claims to be the father's legal guardian, joins his petition on appeal as an intervenor. At the termination hearing, both the father, Matthew, and the paternal grandmother, Cathleen, acknowledged that the father is not capable of caring for L.J. at this time. They are challenging the termination in hopes that the Department of Human Services would place L.J. with Cathleen as a step toward unification with Matthew. Because Matthew avoided opportunities to confirm his paternity, he and Cathleen had only one visit with L.J. In the meantime, L.J. developed a strong bond with her foster parents, who wish to adopt her. Because Matthew does not assert a viable basis to reverse the termination and because her foster family presents the best placement for L.J.'s long-term nurturing and growth, we affirm.

I. Background Facts and Proceedings

In June 2010, Stacy gave birth to L.J. Stacy has a history of significant mental health issues and substance abuse; she had her parental rights to two other children terminated less than one year before L.J.'s birth. The DHS removed L.J. from her mother's care when she was a few days old and the child has been living with the same foster family since that time.

Stacy identified Matthew as one of two possible fathers for L.J. Matthew lived in an apartment in Dubuque with his thirty-two-year-old wife, Sandy, their two-year-old child, as well as Sandy's two older children. Matthew took special

education classes in high school and dropped out before graduating. He testified that he had anxiety, extreme depression, paranoia, post-traumatic stress disorder, "anger issues," and thoughts of suicide, but did not take medications that had been prescribed for him. Matthew also acknowledged his own violent tendencies.

On August 19, 2010, DHS case worker Carrie Habel contacted Matthew:

> I informed him there was a case pending with Stacy [ ] and that he was named as the potential father and he knew that. I notified him of paternity testing, explained what it was, that we needed him to test to see if he could be a potential father. I asked him if he was going to show and he said yes, and then he said that he was concerned because his wife had told him that if he was the father of the baby that she was going to leave him.

Matthew assured Habel that he would attend the appointment, but he did not show up for the testing, despite the fact that the testing center was less than a block from his residence.

Habel tried to contact Matthew again on September 1, 2010, leaving him a voice mail message asking to reschedule the paternity testing. Habel also left two phone messages for Cathleen at the contact number she provided to DHS when Matthew was in the child protection system. In addition, Habel tried to reach Matthew again on October 21 and November 29, 2010, recording voice mail messages each time.

Habel never did hear back from Matthew. But she did receive a call from Cathleen on January 11, 2011, three days after the State filed its petition to terminate Matthew's parental rights. Cathleen claimed that the messages Habel left for her were on the "kids' line" which she did not check. Cathleen told Habel

to set up a date for paternity testing and she would make sure that Matthew got there. Cathleen admitted to Habel that Matthew had mentioned something to her about the paternity issue the previous summer, but that Cathleen thought it was resolved. Matthew acknowledged receiving notice of the paternity testing, but testified that he was concerned he would be in trouble if he submitted to the testing.

On January 7, 2011, the State filed a petition to terminate the parental rights of Stacy[1] and Matthew, as the putative father. On January 28, 2011, the juvenile court continued the termination hearing for Matthew so that paternity testing could be completed. On February 9, 2011, the DHS received the test results confirming that Matthew was L.J.'s father. Family care coordinator Derrick Parsons discussed available services with Matthew. Matthew told Parsons he would like to be involved in L.J.'s life but "would be unable to meet her needs at this point." Matthew requested that L.J. be placed with Cathleen.

On February 24, 2011, the juvenile court held a hearing on termination of Matthew's parental rights.[2] Cathleen testified that she believed that she took the necessary steps to be appointed as Matthew's guardian when he turned eighteen years old. The assistant county attorney took the position at the termination hearing that because there was no oath of guardianship filed and no guardianship letters issued, no valid guardianship was created. *See* Iowa Code

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[1] The juvenile court terminated Stacy's parental rights on February 16, 2011. The mother challenged the termination in a separate appeal and our court affirmed on April 27, 2011. *In re L.J.*, No. 11-0342 (Iowa Ct. App. April 27, 2011).

[2] Matthew and Cathleen met L.J. for the first time the morning of the termination hearing.

§ 633.168 (2011) (requiring that every fiduciary subscribe an oath before entering upon the duties of the office). In addition, no annual reports were filed in the guardianship matter since 2007.

On March 4, 2011, the court issued its order terminating Matthew's parental rights. The court cited Iowa Code section 232.116(1)(b) and (h) as the bases for termination. The termination order did not take a position on the guardianship issue. This appeal involves only Matthew's parental rights.

II. Standard of Review

We review termination orders de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). The juvenile court's findings of fact do not bind our decision, but should be accorded weight, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). Our court will uphold an order terminating parental rights if there is clear and convincing evidence of grounds for termination under Iowa Code section 232.116. *Id.* Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Analysis

The father's petition on appeal raises four issues. First, he contends he was denied equal protection because the State failed to provide him with reunification services and failed to prove the child could not be placed in his custody. Second, he argues he was denied due process because the State failed to timely notify his guardian of the termination proceedings. Third, he disputes that the State offered clear and convincing evidence that he abandoned

his daughter. And fourth, he contends the juvenile court failed to consider the role Cathleen could play in reunifying Matthew with his daughter.

We find no merit in Matthew's first contention. To the extent that he is making an equal protection argument on appeal, we decline to consider it because no constitutional issue was argued to or decided by the juvenile court. Even issues of constitutional magnitude will not be addressed by this court if not presented in the trial court. *In re V.M.K.*, 460 N.W.2d 191, 193 (Iowa Ct. App. 1990). Matthew also frames his argument in terms of reasonable efforts, asserting that the State "did nothing to try to reunify or develop Matthew's ability to provide for [L.J.]." The father did not raise this issue before the juvenile court and therefore has not preserved it for our review. *See In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa Ct. App. 1994) (holding a challenge to the sufficiency of services should be raised at the time the services are offered). In fact, Matthew declined an offer of services from the DHS, telling the service provider that he had too many of his own issues to properly provide for his daughter. Finally, Matthew suggests that the State failed to carry its burden to prove that L.J. could not be safely placed in his custody pursuant to Iowa Code section 232.116(1)(h)(4). The father's claim on appeal is contrary to his testimony at trial when he acknowledged that he was not capable of having L.J. placed in his care "as of right now." He estimated that he could be ready to take custody of his daughter in "a year or two at the most."

We also reject Matthew's second claim on preservation grounds. He asserts on appeal that Cathleen was his legal guardian, but did not receive

"reasonable notification" that L.J. was adjudicated as a child in need of assistance. We don't find in the record that this issue was ruled upon by the juvenile court. The juvenile court did not decide whether Cathleen's efforts established a valid guardianship over Matthew. Moreover, the court did not decide whether Cathleen had received actual notice of the proceedings involving Matthew's paternity or the termination of his parental rights.[3] The father did not file a motion under Iowa Rule of Civil Procedure 1.904(2) seeking to enlarge or amend the court's findings. That rule applies to juvenile court proceedings. *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994). By failing to timely file a rule 1.904(2) motion, Matthew waived his due process challenge to any deficiencies in notice or service of the juvenile court orders on Cathleen. *See id*.

In his third assignment of error, Matthew argues that the State failed to prove by clear and convincing evidence he abandoned L.J. as that term is used in section 232.116(1)(b).[4] Matthew contends that because he did not think he was the baby's father, he could not have intended to abandon L.J. He cites his mental impairment as justification for not submitting to paternity testing when he originally told the DHS worker that he would do so. The juvenile court did not find the father's justification credible. The juvenile court decided:

> In the present case, Matthew had several months to establish his paternity and work on establishing a relationship with the child. Instead, Matthew chose to actively avoid paternity testing

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[3] Cathleen did receive notice of and appeared at the termination of parental rights trial.

[4] "Abandonment of a child" means the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time. I.C.A. § 232.2 (2009).

> and make no efforts to establish communication and association with the child. Based on his conduct and intentions, the Court finds Matthew abandoned the child within the meaning of Iowa Code section 232.116(1)(b).

With deference to the district court's fact finding and in our de novo review of the record, we agree that the evidence supports a finding of abandonment. Matthew told the DHS case worker that he knew from Stacy he could possibly be L.J.'s father and he was worried because his wife, Sandy, said she would leave him if he turned out to be the father. Matthew's concern about the impact of the paternity test on his marriage demonstrates that he understood the import of the DHS notice, but chose to avoid finding out that he was L.J.'s father. His avoidance of paternity testing for personal reasons demonstrates his intent to forego the duties and responsibilities of parenting L.J.

Moreover, even if the evidence of Matthew's abandonment of L.J. were not clear and convincing, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm. *See In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App. 1996). It was undisputed at the trial level that the elements of section 232.116(1)(h) were met. Matthew's third argument does not warrant reversal of the termination.

In his fourth and final argument, Matthew criticizes the juvenile court for not considering "the role that Cathleen could play in the reunification of Matthew and [L.J.] by adopting [L.J.], and the benefits of placing [L.J.] with Cathleen." We find that criticism unwarranted. The juvenile court did consider Matthew's request that L.J. be placed with his mother, Cathleen, "so that he could maintain some type of relationship" with his daughter. The court also lauded Cathleen's

credentials to be a qualified care giver, including her degree in psychology, her current efforts to further her education, and her wealth of experience as a foster and adoptive parent. But the court ultimately rejected a possible placement with Cathleen as a reason to deny or delay the termination of Matthew's parental rights, explaining: "Although Cathleen certainly has the educational and parenting experience to support her request, the reality is she has no established relationship with the child." The court noted that Cathleen did not take Matthew's mention of the paternity issue seriously until the petition for termination of parental rights was filed. Cathleen admitted in her testimony that she "dropped the ball" and should have investigated the paternity matter sooner.

In considering whether termination was in the best interests of the child, the juvenile court appropriately considered that L.J. was "very bonded to the foster parents as she has been in their care since she was three days old." *See* Iowa Code § 232.116(2)(b). We agree that termination of Matthew's parental rights—opening up the possibility of adoption by her foster parents—will best serve L.J.'s need for safety and long-term nurturing and growth.

Finally, the father does not argue—and we do not find—that the factors listed in section 232.116(3) militate against termination.

AFFIRMED.